Supreme Court, U.S.
FILED

02 1742 MAY 22 2003
No. _____

OFFICE OF THE CLERK

In The Supreme Court of the United States

ANTOINE JENNINGS,
Petitioner,
v.

PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

On Petition for Writ of Certiorari To the Supreme Court of Michigan

PETITION FOR A WRIT OF CERTIORARI with Appendix

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(269-342-9900)

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**Counsel of Record*

May, 2002

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(800) 581-2252

63 pp

QUESTIONS PRESENTED FOR REVIEW

Petitioner Antoine Jennings was arrested and convicted of trespassing on a public street at Western Michigan University in Kalamazoo, Michigan during a visit by President Bush, when he held up a small cardboard sign that read "Welcome to Western Governor Bush". The trial judge ruled that Mr. Jennings lost his First Amendment right to protest because the sign was a security threat that could have been used to distract or disrupt the President's motorcade. On appeal the Circuit Court affirmed the conviction on the reasoning that Mr. Jennings was in a restricted secure area, even though the trial judge had prohibited Mr. Jennings from presenting that issue to the jury. The questions on this petition are therefor as follows:

1. **Did Petitioner lose his First Amendment right to hold a cardboard sign on a public street along the route of a Presidential motorcade because the sign could be used to distract or disrupt the President's motorcade?**

2. **Did Petitioner have a Sixth Amendment right to a jury trial to determine if he was trespassing in a restricted secure area that was off limits to all members of the public?**

LIST OF PARTIES

The Petitioner is Antoine Jennings. The Defendant is the State of Michigan.

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Jurisdiction

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OPINIONS BELOW

The order of the Michigan Supreme Court on February 28, 2003 (Apdx. A-1) was not published. The order of the Michigan Court of Appeals on August 30, 2002 (Apdx. B-1) was not published. The Opinion of the Circuit Court for the County of Kalamazoo on May 8, 2002 (Apdx. C-1) was not published. The opinions of the 8th District Court for the County of Kalamazoo on October 30, 2001 (Apdx. E and F) were not published.

JURISDICTION

The final order of the Michigan Supreme Court was entered on February 28, 2003. The jurisdiction of this Court is invoked under 28 USC Sec. 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the

Constitution or the treaties or statues of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

Petitioner Antoine Jennings was arrested on March 22, 2001 for holding a small protest sign on a public street along the motorcade route when President Bush visited the Western Michigan University Campus. The sign was not attached to a stick. The sign read "Welcome to Western Governor Bush". The purpose was to challenge the legitimacy of the last Presidential election. When the University police saw the sign they ordered Mr. Jennings to get behind a building where he could neither be seen nor heard when the President's limousine drove by. The police testified that the sign presented no danger to the President, but that the Secret Service had ordered that anyone holding a sign critical of the President had to be behind the building. When Mr. Jennings protested that he had a right to be on the public street he was arrested.

During the trial the prosecution presented the testimony of University Police Captain Carpenter, and Officer Smith. Their testimony was, in part, as follows:

Q: This was all open to the public here (indicating)?
A: Correct.
Q: And anybody could have gone down to this area (indicating) and stood and watched?
A: Yes.

****

Q: What happens if somebody comes into this area and they hold up a sign?

A: If it's on sticks or wooden - anything that could be used as a weapon, then they have to go back to the demonstration area. They are not allowed to bring them down there into that area.

Q: And a sign without a stick?

A: It was my understanding the Secret Service said all demonstrators had to be in this area (indicating).

Q: They can't go in the area that is otherwise open to the public?

A: That was the instructions we were given.

(Carpenter testimony, Transcript p.27)

****

Q: And a sign without a stick is no threat to anyone, is it?

A: That's correct.

Q: Okay. But the Secret Service didn't want anybody - and this was your understanding and the rule that you were enforcing.

A: Exactly.

Q: Nobody who was critical of the President could be seen in this area; they had to go behind the building?

A: That's correct.

(Carpenter testimony, Transcript p. 29)

****

Q: And that is all public property?

A: It is owned by the State of Michigan.
Q: And this is a street?
A: Yes.
Q: Public street?
A: Yes.
(Carpenter testimony, Transcript p. 60)

Officer Michael Smith also testified that the sign held by Mr. Jennings posed no security threat, and that the demonstration area would not allow any demonstrators to see or be seen by the Presidential motorcade.

Q: Did you consider that sign to be a threat to the President?
A: The sign? No, I did not consider a sign - the sign to be a threat to the President.

Q: Okay. Now, of all the people that gathered in this area, were they all searched for weapons, guns, that kind of thing?

A: I don't know. They were not by me. I don't know if the Secret Service had a control access point around there or not.

Q: You didn't see anybody else searching them?

A: I did not.

(Smith testimony, Transcript p.70)

****

A: My second function was to keep pedestrians behind the yellow police line so that they-were not allowed onto Oliver Street in the way of the Motorcade.

Q: They were allowed in the grassy area north of Oliver and south of Oliver?

A: Correct.

Q: But the people who had signs were not?

A: Correct.

Q: They had to go over here (indicating) behind the student rec center?

A: Correct. I don't know where over there, but somewhere to east of the building, that's correct.

****

Q: But in terms of where the Presidential motorcade came through here, would these people back here (indicating) be able to be seen or heard by any of the public or by the Presidential motorcade from behind that rec center.

A: They would not have, no.

(Smith testimony, Transcript p. 68-69)

In addition to the above testimony Captain Carpenter also testified that Mr. Jennings was yelling at the top of his lungs, disturbing the peace, and that Captain Carpenter told Mr. Jennings many times that he was in a secure area off limits to everyone.

Q: Did you tell him this was a secure area?

A: Yes, I did.

Q: And you told him four times?

A: Many times.

Q: Did you continue to tell him right up until the end of the two minutes-

A: Yes, I did.

Q: when he was arrested?

A: Yes, I did.

(Carpenter testimony, Transcript p. 48)

What Captain Carpenter did not know was that the encounter had been videotaped. That tape shows clearly that Mr. Jennings was never loud or disruptive, and that he was never told that he was in a restricted or secure area. It also shows other

pedestrians walking freely through the area that Captain Carpenter claimed to be a secure area. On the basis of the videotape Mr. Jennings was found not guilty of disturbing the peace. After the tape was shown Captain Carpenter was again cross examined.

Q: You told us on direct that you told Antoine four times, including just before he was arrested, that was a secure area?
A: Yes.
Q: You saw the tape?
A: Yes.
Q: Did you ever tell him on the tape it was a secure area?
A: No.
Q: Do you want to retract that statement?
A: No
Q: Did you ever tell Antoine that he was trespassing?
A: Yes
Q: Is it on the tape?
A: No.
Q: Do you want to retract that statement?
A: No.
(Carpenter testimony, Transcript p. 80-81)

****

Q: You told us on direct that you never told Antoine that he had to leave because you were the police and you decided who could be where on that campus. Do you remember that question and answer?

A: I remember you asking me that , yes.
Q: And your answer was you never said that?
A: Mm-hmm.
Q: Did you hear it on the tape?
A: Yes, sir.
Q: Do you want to retract that statement?
A: I guess I would.
(Carpenter testimony, Transcript p. 82-83)

****

Antoine Jennings also testified at the trial. He testified that other pedestrians were allowed to walk through the area where he was arrested, and that there were no signs indicating that it was as secure area.

Q: Was there - was there any rope that blocked this area off?
A: No.
Q: Any barrier of any kind that blocked that area off?
A: Not at all. You could just walk straight through.
Q: Any sign that said it was a secure area?
A: No.
(Jennings testimony, Transcript p. 164)

****

Q: Captain Carpenter told you that you had to leave because he was the police?
A: That's correct.
Q: And that he decided who could go where on that campus?

A: That's correct.

Q: Did he ever tell you that this was a secure area?

A: No, he did not.

Q: Did he ever tell you that you had to leave because it was a threat to the President?

A: No, he did not.

(Jennings testimony, Transcript p. 165-166)

Q: Did he, then, at any time, tell you it was a secure area?

A: He did not.

(Jennings testimony, Transcript p. 166)

****

Q: How long were you at the police station?

A: I was at Western's police department for approximately a half an hour.

Q: Were you back at Western before President Bush left?

A: Yes, I was.

****

Q: He said that was a restricted area and nobody was allowed. Were you there when the President left?

A: Yes, I was.

Q: How many people were in that parking lot?

A: In excess of 200.

****

Q: Did you have a sign?

A: Not after I came back, no.

Q: Once was enough?

A: Once was enough.

(Jennings testimony, Transcript p. 168-169)

At the completion of the testimony both parties acknowledged that Mr. Jennings had a Constitutional right to protest on a public street unless he was a physical threat to the President, or if he was in a restricted secure area that was off limits to everyone. Defendant Jennings therefore submitted requested jury instructions asking that the jury decide if his sign was a threat to the President, or if he was in a secure area. In a written opinion (Apdx. E-14) the trial judge found as a matter of law that Mr. Jennings had lost his First Amendment right to protest because his paper sign could have been thrown at the motorcade, thereby "disrupting the flow, and potentially endangering the safety of the President." She then refused to instruct the jury regarding the secure area allegation, concluding that it was irrelevant after she found the defendant to be a physical threat to the President (Apdx. F-3). On appeal to the state Circuit Court the prosecution argued that the trial judge was wrong to find the sign a threat to the President, but that Mr. Jennings would have been convicted of being in a secure area if the jury had been allowed to consider it. The Circuit judge accepted this argument, and affirmed the trespassing conviction on the assumption that Mr. Jennings was in a secure area. Both the Michigan Court of Appeals and the Michigan Supreme Court denied leave to appeal.

Petitioner's First Amendment right to protest on a public street was raised in a motion and brief at the trial court, and was rejected by the trial judge in a written opinion (Apdx. E). The Petitioner also demanded a trial by jury in the trial court, and specifically raised his rights under the First and Sixth Amendments in his appeal to State Circuit Court, and in his applications for leave to appeal to the Michigan Court of Appeals and the Michigan Supreme Court.

ARGUMENT

I. The state must have a non-discriminatory legitimate reason to arrest a demonstrator for exercising his First Amendment rights on a public street.

The First Amendment to the United States Constitution reads as follows:

> **Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.**

Like most other rights, the right to speak or protest on a public street is not absolute. The right may be curtailed if an individual is blocking traffic, creating a public disturbance, posing a physical danger, or entering an area that is off limits to everyone. In *Shuttlesworth v City of Birmingham,* 382 US 87 (1965) this Court held that an ordinance requiring a pedestrian to move from a public street after a police officer's request is not Constitutional absent a showing that the accused obstructed free passage. There is no such allegation against Mr. Jennings in the present case.

The requirement for a legitimate governmental purpose is particularly strong when an individual is on public property in exercise of his First Amendment rights. In *Boos v. Barry*, 485 US 312 (1988) this Court reviewed a Washington D.C. regulation that prohibited signs critical of a foreign government within 500 feet of a foreign embassy. With regard to the content of the sign this Court first quoted from its opinion in *Consolidated Edison Co. v. Public Service Comm'n*, 447 US 530, 537 (1980) which stated:

> **We have held that a regulation that does not favor either side of a political controversy is nonetheless impermissible because the 1st. Amendment's hostility to content based regulation extends .....to prohibition of public discussion of an entire topic.**

This Court then looked also at the congregation aspect of the First Amendment. It held that a restriction on the location of a public protest would only be legal if it were limited to groups posing a security threat, citing with approval the holding of the Court of Appeals that the police have the power to disperse protesters from a public street "only when the police reasonably agree that a threat to the security or peace of the embassy is present." (255 US App DC @ 40).

Several Federal District Courts have rejected unsupported claims of security threats as an excuse to restrict free speech. In *Farber v Rizzo*, 363 Fed Sup 386 (EDPA 1973) the police arrested protesters who were bearing anti-war signs outside Independence Hall where President Nixon was appearing to give a speech. In finding the acts of the police unconstitutional the Court held:

> **Persons in this area would have the best opportunity to be seen by the President and the media. The policy of exclusion was not intended to protect the President and was not necessary for security. It was rather an attempt to limit visible dissent to an area where it would be inconspicuous and, thereby, ineffective. Id. p. 394.**

In *Sparrow v Goodman*, 361 Fed Sup 566 (WDNC 1973) the Secret Service denied entrance to potential protesters to Charlotte Coliseum in North Carolina where President Nixon was appearing. In finding that action unconstitutional the Court held:

> **The protection of the President as a justification for what the Defendants did has not even been presented for determination, and should not be an issue in the case unless evidence is offered to support it. No evidence**

> **suggests that any Plaintiff or anyone else was a threat to the safety of the President on Billy Graham Day. Id. p. 588.**

This Court has held on many occasions that the very methods used in this case by the Secret Service and the Western Michigan University police violate the protections of the First Amendment.

> **Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. *Hague v. Committee for Industrial Organization,* 307 U.S. 496,515 (1939).**

> **Streets are the natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.**

Schneider v. New Jersey, 308 U.S. 147, 151-152 (1939).

> One who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion....by handbills and literature as well as by the spoken word. *Jamison v. Texas,* 318 U.S. 413, 416 (1943).

There is absolutely no evidence in this record to support the trial judge's conclusion that a paper sign is a threat to the President sufficient to justify ordering Mr. Jennings to go behind a building where he could neither be seen nor heard. The only two witnesses, the arresting police officers, testified *supra,* that the sign was not a threat. Their testimony was that only signs were banned. People with briefcases, books, backpacks were not ordered to leave. Other objects that could be thrown were quite acceptable. It was only people with signs that the Secret Service wanted out of sight. According to the testimony of Officer Smith, he was unaware of anyone even searching the crowd for guns or weapons. The only rational conclusion is that the Secret Service did not want critical signs to appear on the evening news. This is true even if all signs were banned, as the officers suggested. A cheering and waving crowd looks good on television. Protest signs do not, even if balanced by signs of support.

II. Mr. Jennings was entitled to a jury trial to determine if he was in a secure area.

The Sixth Amendment to the United States Constitution reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

At the trial Mr. Jennings was not allowed to argue whether he was or was not in a secure area, the trial judge concluding that it was not an element of the crime of trespass. (Apdx. F-3). Defendant's requested jury instruction (Apdx. G) was refused, and the jury was instead instructed that Mr. Jennings was guilty if he neglected or refused to leave public property after being instructed to leave by Captain Carpenter. (Apdx. H). On the basis of that instruction the jury found Mr. Jennings guilty of not leaving public property when told to do so. (Apdx. D).

On appeal the prosecution argued that the sign was not a security threat, but that Mr. Jennings was in a secure area off limits to the general public. Officer Carpenter had testified that he was in a secure area, that it was marked, and that Mr. Jennings was warned repeatedly that he was in a secure area. Mr. Jennings testified that there were no markings that it was a secure area, that he was never told it was a secure area, and that the police ultimately allowed hundreds of people to congregate in what was claimed to be a secure area. The videotape, which shows all but the first few seconds of the arrest, does not record Captain Carpenter ever telling Mr. Jennings that he was in a secure area.

Whether Mr. Jennings was or was not in a secure area is a pure question of fact. Under the Sixth Amendment he is entitled to have a jury decide that question. As such, Defendant believes that it was a violation of his right to trial by jury to have an appellate judge determine that the area was in fact a secure area. This is especially true when the appellate judge, acting as fact finder, made his determination entirely from the written record without ever hearing the testimony of Captain Carpenter or Defendant Jennings. The conviction was therefor decided on a factual finding that the jury was never allowed to consider.

CONCLUSION

Antoine Jennings had a Constitutional right to display his sign in any area open to the general public at a political rally. The only exceptions would be if he posed a physical threat to the President, blocked access, or was in a secure area where no one was allowed. The sign that he carried on the day of his arrest was a danger to no one, and he was entitled to have a jury determine if he was in a secure area.

The issues in this case go to the heart of what has made this country free and unique for over 200 years. If the Secret Service can order demonstrators to be out of sight when the President travels on political events the First Amendment will have lost much of its meaning. Freedom of speech and the right to trial by jury are probably the two rights that are most sacred to a free society, dating back to the founding of this country, and the Magna Carta. In this case Mr. Jennings has been deprived of both, and we are all the less because of it.

FORD, MURPHY &
KOBAYASHI, P.C.

By: _____

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STATE OF MICHIGAN, CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO:

Opinion and Order
Affirming District Court,
filed 5/8/02 ..... C1-C4

STATE OF MICHIGAN, EIGHTH DISTRICT COURT FOR THE COUNTY OF KALAMAZOO:

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filed 10/30/01 ..... D1-D2

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For Dismissal (Freedom of Speech),
filed 10/20/01 ..... E1-E15

Denial of Defendant's Request
For Dismissal (Weight of Evidence),
filed 10/20/01 ..... F1-F4

STATE OF MICHIGAN, EIGHTH DISTRICT COURT
FOR THE COUNTY OF KALAMAZOO:(continued)

Defendant's Additional
Proposed Jury Intructions,
filed 9/4/01 ..... G1-G3

Excerpt of Jury Instruction
Read by The Court,
filed 10/26/01 ..... H1-H1

IN THE

Supreme Court of Michigan,

AT LANSING

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

ANTOINE JENNINGS,
Defendant-Appellant.

SC: 122310
COA: 241593
Kalamazoo CC: A01-001390-AR

Order

Entered: February 28, 2003

On order of the Court, the application for leave to appeal from the August 30, 2002 decision of the Court of Appeals is considered, and it is DENIED because we are not persuaded that the questions presented should be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 28, 2003

/s/ Colin R. Davis

IN THE

State of Michigan

Court of Appeals

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

ANTOINE JENNINGS,
Defendant-Appellant.

Docket No. 241593
LC No. 01-001390-AR

Judges: **Richard A. Bandstra**
Presiding Judge
David H. Sawyer
Jane E. Markey

Order

The Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented.

/s/ Richard Bandstra
Richard A. Bandstra, Presiding Judge

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

August 30, 2002
Date

/s/ Sandra Schultz Mengel
Chief Clerk

In The
State of Michigan,
In The Circuit Court
for the County of Kalamazoo

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v.
ANTOINE JENNINGS,
Defendant-Appellant.

FILED
MAY 8, 2002

COUNTY OF
KALAMAZOO,
KALAMAZOO,
MICHIGAN

File No. A01-1390AR

JUDGE:
The Honorable WILLIAM G. SCHEMA, delivered the opinion of the court.

COUNSEL:

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OPINION AND ORDER
AFFIRMING DISTRICT COURT

On March, 2001, the President of the United States, George W. Bush was scheduled to arrive on the campus of WMU to speak at the Student Recreation Center (SRC). The Secret Service established an area for demonstrators, an area for the press and new media, and an area and method by which all ticket holders would enter the SRC that was to be completely off limits to the general public. The "secured area" was marked by yellow ropes, a fence, metal barricades, and police officers who were stationed at various locations along the outer perimeter. Unauthorized person were asked to leave the secured area.

Approximately one hour before the President arrived, Defendant and several other demonstrators marched down the sidewalk on Western Avenue approaching the SRC. Defendant was leading the group. Holding a cardboard sign that read "Welcome to Western, President Bush". The group entered the secured area and stood on the opposite side of the road almost directly in front of the SRC. They were approached by a public safety officer who informed them they were in a secured area and must either return to the demonstration area behind the SRC, or at least step outside the secured area. All the demonstrators but Defendant complied with the Captain's orders.

Defendant was personally warned to leave the secured area or be arrested. He refused, claiming that he was a student at the university and had the right to walk wherever he wanted. Defendant tried to move further into the secured area and was again asked to stop behind the yellow rope. When Defendant failed to comply, he was arrested and removed from the scene. He was later charged with Trespass, or in the

alternative, Disturbing the Peace.

A jury found the Defendant guilty of Trespassing, and he was ordered to pay a fine and court costs. Defendant filed his claim of appeal, claiming a violation of his constitutional right to freedom of speech under this First Amendment of the Constitution.

The Court has reviewed a videotape presented by stipulation at Oral Argument which records the Defendant's march to the point of confrontation with the police and his arrest. It confirms that above recitation of fact.

Issue.

The issue in the case is whether the Defendant was denied his right to exercise freedom of speech when he was arrested after refusing to leave a secured area.

Holding.

The Defendant's constitutional rights were not denied in this case. As in the case of People v Harrison, 383 Mich 585 (1970), Defendant claims that the fact that he was carrying a poster afforded him a basis for this claim. The record, on the contrary, reveals that the issue in this case was not the sign nor the message which the Defendant sought to display, but rather the fact that he was in a restricted area. As stated in Harrison,

"The rights of free speech and assembly, which

> fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time."

The record in this case shows that the Defendant was told to leave a secured area by an authorized individual, and that he refused to do so. Therefore, he is a trespasser under the provisions of the Michigan statue, MCL 750.552. The trial court properly made a decision on the legality of the Defendant's arrest. Moreover, the court properly denied the Defendant's motion for directed verdict based on the appropriate standard review.

The Defendant's conviction is AFFIRMED and the case REMANDED.

WILLIAM G. SCHMA, JUDGE

Proof of Service

I hereby certified that on the 8th day of May, 2002, I served a copy of the above document on the attorneys of record by mailing same first-class mail or by inter-office mail .

/s/ Marilyn S. Howard
Marilyn S. Howard

STATE OF MICHIGAN SE No. 0105340SM

JUDGEMENT OF SENTENCE

8TH JUDICIAL DISTRICT

POLICE No. WMU012927 REF: WMU012927

Court Address: 416 S. Rose Street Court Telephone

ORI MI390025J Kalamazoo, MI 49007 (616) 384-8020

People of STATE OF MICHIGAN

v.

Defendant's name, address, and phone
(734) 996-2396
JENNINGS/ANTOINE/D
923 S FOREST ST
ANN ARBOR, MI 48104

CTN	SID	DOB
390100211101		10/31/1973

The Court Finds:

1. Defendant was found guilty on Oct. 26, 2001 of the crime(s) as stated below.

	CONVICTED BY			CHARGE CODE(S)
CNT	PLEA *	COURT	JURY	CRIME	MCL CITATION/PACC CODE
1	--	--	X	Trespass	750.552

* Plea: insert G for guilty plea; NC for nolo contendere; MI for mentally ill.

2 Defendant was represented by an attorney: JAMES B. FORD P-26997

IT IS ORDERED:

7. Defendant shall pay as follows:

			CRIME			DUE
CNT	FINE	COSTS RESTITUTION	VICTIM	OTHER	TOTAL	DATE
1	$45.00	$55.00			$100.00	---

Fine, cost and fees not paid within 56 days of the due date are subject to a 20% late penalty on the amount owed. If a cash bond/bail was personally deposited by defendant, payment toward the total is to first be collected out of that bond/bail.

October 30, 2001	/s/ Ann L. Hannon	P-26277
Date	Judge Ann L. Hannon	Bar No.

Under MCL 769.16a clerk of the court shall send a copy of the order to Michigan State Police Central Records Division to create a criminal history record. MCL 765.15(2); MSA 28.902 (2), MCL 769.16a; MSA 28.1086(1), MCL 775.22; MSA 28.1259, MCL 780.766; MSA 28.1287(766), MCL 780.826; MSA 28,1287 (826), MCR 6.427(A) Recordable to SOS under: MCL 257.625(20) (a), MCL257.732, MCL257.1541, MCL281.1040, MCL324.80131, MCL324.82157, MCL333.7408a(11), MCL333.7408a(aa), MCL 257.625(20) (b) MC 219 (6/99) JUDGEMENT OF SENTENCE/COMMITMENT TO JAIL

In The
State of Michigan,
In The 8th District Court
For The County of Kalamazoo,

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v.
ANTOINE JENNINGS,
Defendant-Appellant.

File No. 01 05340 SM

JUDGE:
Ann L. Hannon

COUNSEL:

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DENIAL OF DEFENDANT'S REQUEST FOR DISMISSAL (FREEDOM OF SPEECH)

This matter comes before the Court for decision on Defendant's Motion to Dismiss. Defendant is charged with Disturbing the Peace or, alternatively, Trespass. A jury trial was begun on August 17, 2001. All proofs were taken and, prior to closing arguments, Defendant moved orally for dismissal of the charges on ground that the arrest interfered with his constitutional right for free speech. Defendant presented a written brief in support of his motion. Because of the importance of the issue and the fact that the Prosecutor had no opportunity to review the motion, the Court took the matter under advisement. The Prosecutor filed its written response to the motion on August 25, 2001. Neither party requested an evidentiary hearing at that point; both relied upon the testimony admitted at trial and the briefs submitted.

At that time, Defendant also requested special Jury Instructions. At a later date, Defendant moved to dismiss both counts on the grounds that no reasonable jury could find guilt beyond a reasonable doubt. The Request for Special Instructions and the second Motion to Dismiss are decided separately.

The Charge

Defendant is charged with violation of MCL 750.170 (Disturbing the Peace) which reads as follows:

> Any person who shall make or excite a disturbance...in any street, lane, alley, highway, public grounds or park shall be guilty of a misdemeanor

Alternatively, Defendant is charged with violation of MCL 750.552 (Trespass) which reads as follows:

> ...Any person being upon the land or premises of another, upon being notified to depart therefrom by the owner or occupant, the agent or servant of either, who without lawful authority neglects or refuses to depart therefrom, shall be guilty of a misdemeanor...

Background

It is important to recognize the context in which this case comes before the Court. On March 27, 2001, President George W. Bush was present and spoke on the campus of Western Michigan University, Kalamazoo, Michigan. Prior to the President's arrival, local police agencies working with Secret Service agents made logistical decision regarding how traffic would flow, where demonstrations could be held, etc. Of relevance to this case, the law enforcement agencies decided that there would be no signs in proximity to the presidential motorcade. A "demonstration area" for attendees carrying signs was established.

Defendant appeared at the event carrying a sign. Wesley Carpenter, a police officer and agent of Western Michigan University, directed the Defendant to the demonstration area. The Defendant, still in possession of his sign refused to go to the specified area. Capt. Carpenter testified that he informed Defendant that he had to leave the area; Defendant refused, claiming that he had a constitutional

right to remain where he was, with his sign. The discussion became heated. Capt. Carpenter then arrested Defendant for disturbing the peace and trespassing.

Law

Defendant relies upon several federal cases where courts have commented on and/or limited the ability of public officials to regulate public property, placing particular reliance on Boos v. Barry, 485 U.S. 312 (1988), Faber v. Rizzo 363 F. Supp. 386 (E.D. Pa 1973), and Sparrow v. Goodman, 361 F. Supp. 566 (W.D. N.C. 1973). Defendant also cites, and the Prosecutor relies upon. Madsen v. Women's Health Ctr. 512 U.S. 753 (1994). Each case will be considered separately.

In Boos, *supra*, the case involved an ordinance of the District of Columbia which prohibited either the display of an offensive sign (the display clause) or the congregation and refusal to disperse from an area within 500 feet of a building used or occupied by a foreign government (the congregation clause). Petitioner Boos and his companions wished to carry signs critical of foreign governments. Conceding that the conduct would violate the ordinance, they initiated suit claiming that the ordinance itself was unconstitutional as it interfered with petitioner's right to free speech. There was no police action involved; the suit was filed before any potentially unlawful conduct occurred. The federal district court granted the District of Columbia's motion for summary judgement; the federal court of appeals affirmed the dismissal.

In considering the case, the Supreme Court differentiated between the display clause and the congregation clause. In regard to the display clause, the Court reversed, holding that to prohibit criticism of any party, even a foreign entity, is inconsistent with the First Amendment. (The language cited by the Defendant Jennings in his brief related to the display clause.) In regard to "the congregation clause," the Supreme Court noted that the Court of Appeals had construed the ordinance as applying only to congregations that are directed at an embassy and limiting the power to disperse to "only when the police reasonably believe that a threat to the security or peace of the embassy is present." [255 U.S. App. D.C. at 40]. So narrowed, the Court found, the congregation clause did not violate the First Amendment; specifically, the Court held that the ordinance "merely regulated the place and manner of certain demonstrations." The Court noted with approval that the clause was "site specific," did not prohibit peaceful congregations, and that it limited only groups posing a security threat.

Farber v. Rizzo, *supra*, an earlier federal district court case, involved demonstrations outside an auditorium where then President Nixon was speaking. The demonstrators congregated the night before the speech. At midnight, the police made the south side of the street a 'security area;' the north side of the street was never classified a 'secure area'. The police asked the demonstrators to move to the north side and apparently this move was made without incident. In the morning, demonstrators with signs were ordered to leave the north side of the street. They were told that the area would be closed to persons with signs and leaflets and that demonstrations could only be held a block away. Shortly

thereafter several of the demonstrators were arrested. Discussions and negotiations ensued, but ultimately a hearing was held in the federal district court. After taking testimony, the court made a finding of fact that "the policy of exclusion was not intended to protect the President and was not necessary for security".

The court issued a Temporary Restraining Order which "forbade interference with the peaceful exercise of First Amendment rights in areas open to the public..." The police were informed of the TRO. In spite of the TRO, the police refused to permit people carrying signs and/or leaflets to enter the area; several were arrested,[1]. The claim before the court in Farber was that the police had violated the TRO and should be help in civil contempt. Again after taking testimony, the court determined that the actions of the police had the sole purpose of preventing people from exercising their First Amendment rights. Having made that finding, the court found the police guilty of contempt.

Sparrow, *supra*, again an earlier federal district court case, involved the exclusion of people from "Billy Graham Day" at which then President Nixon was appearing. Those excluded brought a civil action from damages claiming that they were unconstitutionally arrested and/or assaulted. The case was before the federal district court on motions of the defendants (police) for summary judgement and to dismiss. The only basis presented in support of the motions was the claim of "executive privilege." A hearing was held and much

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[1]No criminal charges were ever brought.

testimony (six hundred pages) was taken. Base on the evidence submitted in that factual scenario, the court held that the police could not rely upon executive privilege to justify all actions. In order to lawfully restrict the exercise of free speech, police agencies would have to present substantive reasons for the restriction. Significantly, the court stated in its conclusions of the law that:

> The existence of good faith, the presence of an illegal motive (such as suppression of dissent) and the reasonableness of the belief of the Secret Service and other law enforcement officials are questions of fact rather than occasions of exercise of executive privilege. They are the sorts of things which courts are created to inquire into.....
>
> If evidence is introduced to show that the actions of the defendants were necessary..., that evidence will certainly be fully considered. Lacking such evidence, I must adjudicate the equities on the basis of the facts as they are shown by the testimony of the witnesses rather than upon legalistic arguments. (at 586, emphasis added)

The testimony presented is summarized in the opinion. Insufficient evidence, if any, was presented to justify the arrests. Based upon the evidence submitted, the court denied the motions to dismiss. Presumably, the case was tried.

Most instructive is Madsen v. Women's Health

Center, *supra*. Madsen arises in yet a third context. A n injunction was issued by a state court, limiting the actions of persons wishing to demonstrate at or near an abortion clinic and/or the homes of employees of the clinic. The potential demonstrators brought suit challenging the constitutionality of the injunction. The Court found that the injunction itself was content-neutral and thus was not subject to the s trict scrutiny applied to orders designed to regulate a specific type of speech. Nevertheless, because an injunctive order does not represent legislative choices and carries greater risk of censorship and discriminatory application, a stricter scrutiny than the standard 'time, place, and manner analysis' in required. Accordingly, the Court required that challenged provision burden "no more speech than necessary to serve a significant governmental interest." In determining the constitutionality of the injunction, the Madsen Court had the benefit of evidence presented at a 3-day evidentiary hearing in the trial court.

Discussion

Clearly, the decision as to whether (and in what way) the police have the right to limit demonstrations is a question of law, to be decided by the court, based upon facts submitted relating to that question. In the best of all worlds, the question would be submitted to a court of general jurisdiction by means of a petition for injunctive relief, as in Madsen, *supra*. Lacking time and/or fore-knowledge that there would been a need for injunctive relief, any aggrieved party has the power to seek a Temporary Restraining Order, as in Farber, *supra*. Neither a Preliminary Injunction nor a TRO were sough in this case.

In a criminal case, such as in now before the court, a constitutional defense may be raised at any time; preferably, however, the issue is presented by motion prior to trial. By waiting to raise the issue until after proofs had closed and witnesses been released [2], Defendant effectively prevented the Prosecutor from presenting full evidence regarding the necessity for regulation and/or what consideration had been taken regarding the restrictions imposed. Because neither party requested an evidentiary hearing, the court must relay upon the trial testimony.

The "premises" involved in this case is a public street. Defendant does not challenge the right and responsibility of Western Michigan University to control the use of the street in general [3] Adderly v. Florida 385 U.S. 87 (1996).

Likewise, there is no disagreement that Ofr. Carpenter was an appropriate agent to enforce WMU's control of the premises.

The Defendant does not claim that the statute itself is

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[2]The court recognizes the defense counsel here was not retained until two weeks before trial, but there was no request for adjournment (such a request could easily have been granted, other trials were scheduled for the same day) and Defendant's written brief is dated two days before trial. The court concludes that Defendant intentionally attempted to ambush the Prosecutor.

[3]Indeed WMU often controls the flow of traffic (pedestrian and vehicular) on this and adjacent streets during athletic and/or cultural events.

unconstitutional, it is the actions of the police that he finds objectional. While there was not a specific injunctive order, the action taken by WMU police was injunctive in nature and should be judged by standards applied to injunctive actions. As noted in Madsen, an injunctive action may well impact a particular point of view more heavily than others. The court's first function is to assure that, if the government has imposed a restriction of speech, the regulation is "without reference to the content of the regulated speech" cf. Ward v. Rock again Racism 491 U.S. 781 (1989)

By requiring that demonstrators move to a specified area, the police restricted their right to say whatever, whenever, however, and/or wherever they wanted. Initially, then, the court must decide whether the restriction was content-based (as in Sparrow) or content-neutral (as in Madsen). The court is aware that in cross-examination, Ofr. Carpenter responded that anyone critical of the President had to go to the demonstration area [4]. The Court is also aware that at no other time did Ofr. Carpenter indicate anything other than the precautions were for security purposes. When asked specifically, Ofr. Carpenter stated unequivocally that any sign-carrying demonstrator (regardless of the content of the

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[4] Q. .. But the Secret Service didn't want anybody- and this was your understanding and the rule you were enforcing...
A. Exactly
Q. –nobody who was critical of the President could be seen in this area; they had to go behind the building?
A. That correct. (at 29)

message) would be directed to the demonstration area[5] . There was never any suggestion that demonstrators favorable to the President were or would have been permitted to remain in the area. At all times, Ofr. Carpenter referred to the people to be moved as "demonstrators", not "protesters". Based on the testimony and the circumstances, this court finds that the regulation imposed by the WMU police was content-neutral.

Applying then the standard announced in Madsen for application when the regulation is content-neutral – i.e. that "the challenged provisions ...burden no more speech than necessary to serve a significant government interest" – the court must consider what governmental interest was being served and the extent to which the speech was burdened. In Madsen, the Court recognized that "the State has a strong interest in ensuring the public safety and order." Although there was no specific testimony regarding safety and/or order, the court takes judicial knowledge that these are the goals of

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[5] Q. If they had signs that say "We love you, Bush. Long live Bush" with a stick, would they be in trouble?
A. Yes
Q. If they had signs, "We love your foreign policy, Bush," would they be in trouble?
A. Yes.
Q. So no matter what the sign said, they would have been requested to go to the established demonstration area?
A. Everyone carrying a sign, pro–it didn't matter what it was. They had to go to the demonstration area.
Q. So it wasn't the content of the sign?
A. No. (at 59-60)

all police agencies. Ofr. Carpenter testified that the event attracted 800 or so invited dignitaries along with media coverage. A presidential visit in a small/medium city such as Kalamazoo generates considerable public interest and attendance. The court finds that crowd control would have been necessary.

Beyond the standard crowd control measures that would have been necessary for a routine athletic or cultural events, law enforcement agencies on the day of the incident were necessarily concerned with the safety of the President. Considering "government interests" in general, it is the belief of this court that the security of the head of the country is of the highest significance, much higher than protecting the safety of a health clinic[6]. The court also takes judicial notice that many times activities that are planned as peaceful turn chaotic with very little reason or warning (e.g. Seattle, Rome, Lafayette). Thus, the court concludes, the police have the right to impose necessary restrictions to protect this significant national interest.

Turning then to the restrictions that were imposed. It appears that several areas were created. There was the roadway itself, where the motorcade would travel. There was an area behind the yellow ropes where observers could stand, but where no signs were allowed. There was a separate area

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[6]Admittedly, the events of 9-11-01 have impacted this court's appreciation of the importance of security issues. On the other hand, the importance of security has not changed; only public awareness of security considerations have been heightened.

where demonstrators were to stand. Demonstrators were defined as anyone carrying a sign; signs of any size were restricted. Ofr. Carpenter testified that there was no restriction on speech itself, only persons carrying signs were moved to the demonstration area. The rational of banning signs was that the signs could be thrown at or into the path of vehicles in the motorcade, disrupting the flow and potentially endangering the safety of the President. Of particular concern were signed mounted on sticks as the sticks could be used as weapons. The distance necessary between the signs/sticks and the motorcade was established by the Secret Service.

The demonstration area itself was approximately 100-200 yards from the area that the Defendant wanted to be in. The demonstration area was described as near W. Michigan Street, an area where the media did their staging. Ofr. Michael Smith testified that people in the demonstration area would not have been seen or heard by the public or by the presidential motorcade. The court cannot rely totally on the opinion of Ofr. Smith regarding whether or not the demonstrators could be seen or heard. Ofr. Smith was directing traffic on Oliver Street between Stadium and Western Avenues, an area somewhat distance from the demonstration area.

There was no restriction on verbal speech. Speech-on-signs was not prohibited per se. The location of the signs were prescribed. In Madsen, *supra*, the Court dealt with a 36-foot buffer zone. Here, the distance involved is much greater, approximately the distance approved in Boos, *supra*. In Madsen, however, the physical area was congested; the court discussed the width of the street i n d etermining the

reasonableness. In Kalamazoo, the area itself is much more open, making the number of feet less determinative. Further, apparently in Madsen there were no other societal interests to consider (other than the welfare of the clinic). H ere, t he police also had to consider the interests of the non-demonstrating observers: citizens who came to the area to see/be close to the Presidential motorcade. Accepting the premise that signs could have been used to block/disrupt the motorcade[7], the decision to segregate the sign-carrying public from the rest of the observers was a rational one. The fact that the demonstrators had the right to be at the rally and to display their signs does not mean that they had the right to a prime observation point.

Weighing the significance of the governmental interest against the burden that was placed upon Defendant's speech, the court does not find that the restriction was more than what was reasonably necessary. Defendant's Motion to Dismiss is DENIED.

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[7]An argument could be made, but was not, that in a crowd such as this, signs block the view of shorter members of the viewing public. It would seem that a governmental interests exists in permitting all members of the general public to, at the very least, see the President as he passes by.

The constitutionality of the police restriction of Defendant's actions, is a legal issue. The Jury will be asked to decide questions of fact. The court will not permit closing arguments based upon legal issues, including the right of free speech.

/s/ Ann L. Hannon
Ann L. Hannon
District Judge

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DENIAL OF DEFENDANT'S
REQUEST FOR DISMISSAL (WEIGHT OF EVIDENCE)

This matter comes before the Court for decision on Defendant's Motion to Dismiss. Defendant is charged with Disturbing the Peace or, alternatively, Trespass. A jury trial was begun on August 17, 2001. All proofs were taken and, prior to closing arguments, Defendant requested special jury instructions. The Court took the Defendant's request under advisement. On September 5, 2001, Defendant files this motion to Dismiss, claiming that "no reasonable jury could find beyond a reasonable doubt that he has committed either of the offenses for which he is charged".

In his Brief supporting the Motion, Defendant claims that, in regard to the Disturbing the Peace charge, "the video tape...proves beyond any doubt whatsoever" that Defendant is Not Guilty. To the contrary, the video tape is but one piece of evidence that the jury can consider in reaching its decision. The testimony of both Prosecution and Defense witnesses provide other pieces of evidence. Both the Defendant and one of the Prosecution witnesses testified that the video tape may not have captured everything that occurred on March 27th. The jury will be permitted to weigh the evidence and reach the verdict it feels appropriate.

In regard to the charge of Trespass, Defendant argues that the Court should direct a verdict of Not Guilty because a) there is insufficient proof that the area in question was a "secure" area and b) there is insufficient proof that Defendant was told that it was a secure area.

In regard to whether or not the area was indeed a "secure" area, this is simply not an element of the alleged crime.

In regard to whether Defendant was told that this was a secure area and that is why he had to depart, one of the critical elements in any trespass case is that the Defendant was notified to depart by a person who had control of the property. Ofr. Carpenter testified that he repeatedly told the Defendant to leave the area and Defendant does not contest that he was told to do so. There is no requirement that the custodian of the property explain why notification is given. Indeed, to require such an explanation, in this scenario as with others, would lead to extended discussions/negotiations – neither of which are in the interest of security and/or property management and/or crowd control.

Here, as elsewhere, Defendant argues that "the only reasons given for ordering Defendant to leave the area was unconstitutional". This constitutional argument is decided elsewhere.

In considering a Motion for Directed Verdict (here termed a Motion for Dismissal), the court considers the evidence in the light more favorable to the People. While there are elements upon which the parties do not agree and it is Defendant's belief that the totality of the evidence does not support a conviction, sufficient evidence has been presented which, if believed, would support a conviction of either of the

charges. In regard to factual questions, the jury has the power to believe or disbelieve any evidence – testimony or tape – and the Court will not remove this decision form the jury's consideration.

/s/ Ann L. Hannon
Ann L. Hannon
District Judge

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DEFENDANT'S ADDTIONAL PROPOSED JURY INSTRUCTIONS

4. The 1st Amendment to the United States Constitution states that Congress shall make no law abridging the freedom of speech or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. Article 1, Section 3 of the Michigan Constitution states that

> "The people have the right peaceably to assemble, to consult for the common good, to instruct their representatives and to petition the government for redress of grievances."

It is the burden of the prosecution to prove the following beyond a reasonable doubt in order to sustain a conviction for trespass:

1. That Defendant was in a secure area where no other members of the public were allowed;

2. That Defendant was told that he was in secure area and that he refused to leave;

3. That the secure area was established for the security of the President, and not just to prevent protestors from exercising their constitutional right to freedom of speech.

If the Prosecutor has not proven each of these elements beyond a reasonable doubt, then you must find the Defendant not guilty.

FORD,MURPHY & KOBAYASKI, P.C.

By: /s/ James B. Ford
James B. Ford
Attorney for Plaintiff

Dated: September 4, 2001

Proof of Service

Pursuant to MCR 2 107, the undersigned certifies that a copy of this document was served by First Class Mail with postage fully prepaid to all attorneys of records on September 4, 2001.

/s/ Carrie J. Rouse

* * *

Now, alternatively, the defendant is charged with trespassing. The defendant has pled not guilty to this charge as well. In order to establish this offense, the prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the defendant was on the property that he did not own; more specifically, on property that was under the control of Western Michigan University. Second, that the defendant was notified to depart from this property by Wesley Carpenter. Third, that Wesley Carpenter was an agent of Western Michigan University. Fourth, that the defendant did neglect or refuse to depart from the property.

* * *